IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARRY MICHAELS,
43 Diamond Run Street
Las Vegas, NV 89148,
Plaintiff,

v.

MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY,
950 Pennsylvania Avenue, N.W.,
Washington, D.C. 20530;

ROD J. ROSENSTEIN, IN HIS OFFICIAL CAPACITY,
950 Pennsylvania Avenue, N.W.,
Washington, D.C. 20530;

NOEL J. FRANCISCO, IN HIS OFFICIAL CAPACITY,
950 Pennsylvania Avenue, N.W.,
Washington, D.C. 20530;
Defendants.

Case No. 18-cv-2906

AND

BARRY MICHAELS, *ex rel.* UNITED STATES OF AMERICA,
43 Diamond Run Street
Las Vegas, NV 89148,
Plaintiff,

v.

MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY,
950 Pennsylvania Avenue, N.W.,
Washington, D.C. 20530,
Defendant.

* * * * * * * * * * * * * *

MOTION FOR JURISDICTIONAL DISCOVERY

Plaintiff respectfully requests that this court order the Government to respond to a limited set of interrogatories, *see* Attachment, to establish the extent of Matthew Whitaker's involvement in this case and Plaintiff's Supreme Court case, which goes to the heart of Plaintiff's standing to challenge Mr. Whitaker's authority. Plaintiff has shown, and the Government concedes, that this Court has inherent authority to supervise and manage these proceedings, including the behavior of anyone involved in the case.[1] And Plaintiff alleged facts plausibly establishing that Mr. Whitaker has inserted himself into decisions affecting Plaintiff directly, including both directly in these proceedings and in decisionmaking related to his pending Supreme Court Petition. The Government has attacked the factual basis of Plaintiff's allegations. Thus, Plaintiff is entitled to jurisdictional discovery that may be dispositive of whether this case may proceed.

1. As Plaintiff alleged, Matthew Whitaker was and continues to be directly involved in this case and Plaintiff's case before the Supreme Court—on the general question whether to defend the constitutionality of 18 U.S.C. § 922(g)(1) as well as the response to Plaintiff's highly publicized challenge to Mr. Whitaker's authority. Plaintiff also established another basis for standing—Mr. Whitaker's involvement in Plaintiff's request that the Attorney General seek a writ of *quo warranto* that Mr. Whitaker is not the Acting Attorney General. Am. Compl., ECF 14 ¶¶

[1] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'") (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)); *Ryan v. Astra Tech, Inc.*, 772 F.3d 50, 58 (1st Cir. 2014) ("Certainly the district court possesses inherent authority to . . . control who may appear before it.") (citing *Chambers*, 501 U.S. at 42-46); *In re Atl. Pipe Corp.*, 304 F.3d 135, 145 (1st Cir. 2002) (district court has inherent authority to order parties to participate in mediation); *In re United States*, 149 F.3d 332, 333 (5th Cir. 1998) (district court has inherent authority to compel attendance at mediation by a government attorney with suitable authority).

1-2, 4, 14-16, 20-24, 28-29; *also* Pl.'s Mot. for Prelim. Inj., ECF 2 ¶¶ 1, 3-4. Mr. Whitaker's direct involvement in Plaintiff's cases and his request for a writ of *quo warranto* are sufficient injuries to challenge his authority. *See Landry v. FDIC*, 204 F.3d 1125, 1130-32 (D.C. Cir. 2000).

2. Shortly after oral argument, the Government voluntarily disclosed that Mr. Whitaker is not involved in the decision whether to act on Plaintiff's *quo warranto* request, thus using that voluntary targeted disclosure as a sword to defeat one of Plaintiff's grounds for standing. At the same time, the Government refuses to disclose Mr. Whitaker's involvement in any other respect—using its control over the same information as a shield to defeat Plaintiff's other grounds for standing. This alone entitles Plaintiff to an order compelling answers to his proposed interrogatories. Even when material is *privileged*, selective disclosure for tactical advantage opens the door to discovery on the entire subject matter. "The prohibition against selective disclosure of confidential materials derives from the appropriate concern that parties do not employ privileges both as a sword and as a shield." *Koch v. Cox*, 489 F.3d 384, 390 (D.C. Cir. 2007) (waiver of psychotherapist-patient privilege) (internal quotation marks omitted); *S.E.C. v. Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997) (waiver of marital privilege). "When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter because the privilege of secret consultation is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) (waiver of attorney-client and work-product privileges) (internal quotation marks omitted). Here, the Government agrees that the fact of Mr. Whitaker's involvement is not even privileged to begin with. And it is unquestionably material, or else the Government would not have disclosed his recusal as to *quo warranto*. The Government cannot disclose Mr. Whitaker's

involvement in order to defeat standing in some instances, while it withholds such information to also defeat standing in others.

3. The Government's disclosure relating to the *quo warranto* proceedings cannot be explained away on the ground that Plaintiff inevitably would have learned of Mr. Whitaker's recusal. That is entirely circular. Plaintiff would have learned it only because the Government would disclose it—precisely what it is refusing to do here. The Government generally does not even provide a response to *quo warranto* petitions at all. *See, e.g.*, *Sibley v. Obama*, 866 F. Supp. 2d 17, 20 (D.D.C. 2012), *aff'd*, No. 12-5198, 2012 WL 6603088 (D.C. Cir. Dec. 6, 2012) (Attorney General's "lack of response" to plaintiff's *quo warranto* request does not meet "the refusal condition of D.C. Code § 16–3503"); *Taitz v. Obama*, 707 F. Supp. 2d 1, 3 (D.D.C. 2010) (plaintiff could not seek *quo warranto* writ herself, even though, as complaint described, "[n]o response was received for ten months" on plaintiff's *quo warranto* request). If it did respond, nothing would prevent it from doing so by letter from its lawyers in this case simply saying, without elaboration, that the request was denied. Although the Attorney General must consider a quo warranto request (assuming he is not recused), nothing says he has to write a response. So the Government's voluntary, selective disclosure was purely tactical for its own advantage.

4. Plaintiff is independently entitled to jurisdictional discovery in any event. The Supreme Court recognizes that when "issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978). This is true whether the case involves "personal jurisdiction or subject matter jurisdiction." Wright & Miller, 8 Fed. Prac. & Proc. Civ. § 2008.3 (3d ed.) (collecting cases). Thus, "jurisdictional discovery is appropriate to assist the Court in resolving issues of fact relevant

to standing." *Food & Water Watch v. Trump*, No. 17-1485 (ESH), 2018 WL 6448634, at *5 (D.D.C. Dec. 10, 2018).

5. Although the "district court retains 'considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction,'" it "*must* give the plaintiff 'ample opportunity to secure and present evidence relevant to the existence of jurisdiction.'" *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (quoting *Prakash v. American University,* 727 F.2d 1174, 1179-80 (D.C. Cir. 1984)) (emphasis added). Indeed, the D.C. Circuit will remand for jurisdictional discovery when "allegations indicate its likely utility," *Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1024 (D.C. Cir. 1998), and plaintiff "sufficiently demonstrate[s] that it is possible that he could supplement" his jurisdictional allegations "through discovery," *El–Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996). *See Edmond v. United States Postal Serv. Gen. Counsel*, 949 F.2d 415, 425 (D.C. Cir. 1991) (remanding because "it is an abuse of discretion to deny jurisdictional discovery" in light of allegations suggesting jurisdiction); *Crane v. Carr*, 814 F.2d 758 (D.C. Cir. 1987) (similar). In selectively disclosing Mr. Whitaker's recusal to defeat Plaintiff's standing based on his *quo warranto* request, the Government admits the "utility" of this information. If Mr. Whitaker is involved in these proceedings or those in Plaintiff's Supreme Court case, Plaintiff is entitled to challenge his authority under *Landry*, 204 F.3d at 1131, and this Court must resolve the Appointments Clause issue.

6. The Government will argue, as it did in its purported "status report," that Plaintiff is not entitled to jurisdictional discovery while he concurrently moves for summary judgment. Defs.' Status Report, ECF 21 at 5. The Government does not deny, though, that courts "often permit discovery while motions to dismiss and other threshold motions are pending." *Sai v. Dep't*

of Homeland Security, 99 F. Supp. 3d 50, 58 (D.D.C. 2015) (Moss, J.). It is up to the district court to decide, in its sound discretion, because here as always "[c]ourts are vested with broad discretion to manage the conduct of discovery." *Id.* at 58 (internal quotation marks omitted). So too in the context of jurisdictional discovery. *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1093-94 (D.C. Cir. 2008) (it is "well established" that district courts have "broad discretion" to order jurisdictional discovery).

7. This case is a prime example of when a court *should* exercise its discretion and order discovery simultaneous with the set schedule for cross-summary-judgment briefing. Inevitably, Plaintiff would be able to file a Fed. R. Civ. P. 56(d) affidavit in opposition to the Government's cross-motion for summary judgment, specifying why he cannot present facts essential to justify his opposition, and seeking the same jurisdictional discovery he requests here. Moreover, the underlying issues are purely legal and as the Government admits "undoubtedly important," *see* Defs.' Status Report, ECF 21 at 1, and Plaintiff's proposed discovery is exceedingly limited. It is striking that the Government did not previously assert that the discovery is unduly burdensome. The only reason that there would be any burden *at all* is if Mr. Whitaker is participating, so there is something to discovery. If not, responding will take little time at all. Defendants' answers to only a few discrete interrogatories will establish whether there is a basis to proceed to the merits of important legal issues. *See supra*.[2]

[2] Defendants' reference to Fed. R. Civ. P. 26(f) has no bearing on the Court's authority to compel—and indeed, Plaintiff's entitlement to—jurisdictional discovery. *See* Local Rule 26.2(f) ("a party may not seek discovery before the parties have conferred as required by Fed. R. Civ. P. 26(f)" "*[e]xcept . . . by order*" of the court). Plaintiff requested that Defendants voluntarily provide the information, as Defendants did for the *quo warranto* recusal. They've refused, requiring Plaintiff to file this motion. Defendants do not suggest any other process that is available, other than by order of the Court.

8. If the Government refuses to provide any answers despite Plaintiff's entitlement to jurisdictional discovery, Plaintiff is entitled to the negative inference that, in fact, Mr. Whitaker was directly involved in Plaintiff's Supreme Court case and the proceedings in this Court, or else the Government would have said otherwise as it did with Plaintiff's *quo warranto* request. *U.S. Bank Nat'l Ass'n v. Poblete*, No. CV 15-312 (BAH), 2017 WL 598471, at *3 (D.D.C. Feb. 14, 2017) (failure to "respond to the plaintiff's propounded interrogatories" may result in "negative inferences" under Fed. R. Civ. P. 37); *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 58, 68 (D.D.C. 2000) (court "may draw an adverse inference from [defendant's] refusal to answer plaintiffs' questions about his jurisdictional contacts").

9. For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order requiring Defendants to provide answers to the attached interrogatories by January 14, 2019, *see* Attachment, the date their combined opposition and cross-motion for summary judgment is due.

By: /s/ Thomas C. Goldstein

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PROPOSED INTERROGATORIES

1. With respect to each meeting or communication in which Matthew Whitaker was the sender, recipient, or participant that addressed the subject of the constitutionality or legality of his designation as Acting Attorney General, identify:

    a. the meeting or communication;

    b. the participants; and

    c. the relevant general topic of discussion (including any particular litigation that was addressed), without disclosing any privileged material relating to the content of the communication.

2. In the event that Mr. Whitaker has recused from any matters or issues relating to the constitutionality or legality of his designation as Acting Attorney General, identify:

    a. the issue or matter;

    b. when the recusal occurred; and

    c. whether Mr. Whitaker participated in those matters or issues prior to his recusal.

3. With respect to each meeting or communication in which Mr. Whitaker was the sender, recipient, or participant that addressed any issues presented in Plaintiff's Supreme Court case, *Michaels v. Whitaker*, No. 18-496 (U.S. June 27, 2018), identify:

    a. the meeting or communication;

    b. the participants; and

    c. the relevant general topic of discussion, without disclosing any privileged material relating to the content of the communication.

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* * * * * * * * * * * * * *

[PROPOSED] ORDER GRANTING PLAINTIFF'S
MOTION FOR JURISDICTIONAL DISCOVERY

On full consideration of plaintiff's motion for jurisdictional discovery, the motion is GRANTED, and Defendants are hereby ORDERED to respond to the following interrogatories by January 14, 2019:

1. With respect to each meeting or communication in which Matthew Whitaker was the sender, recipient, or participant that addressed the subject of the constitutionality or legality of his designation as Acting Attorney General, identify:

    a. the meeting or communication;

    b. the participants; and

    c. the relevant general topic of discussion (including any particular litigation that was addressed), without disclosing any privileged material relating to the content of the communication.

2. In the event that Mr. Whitaker has recused from any matters or issues relating to the constitutionality or legality of his designation as Acting Attorney General, identify:

    a. the issue or matter;

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3. With respect to each meeting or communication in which Mr. Whitaker was the sender, recipient, or participant that addressed any issues presented in Plaintiff's Supreme Court case, *Michaels v. Whitaker*, No. 18-496 (U.S. June 27, 2018), identify:

    a. the meeting or communication;

    b. the participants; and

    c. the relevant general topic of discussion, without disclosing any privileged material relating to the content of the communication.

IT IS SO ORDERED.

Dated: January ___, 2019

_____
United States District Judge